

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK BRUMMITT,

Defendant.

ORDER

08-cv-215-bbc

04-cr-127-bbc

Defendant Mark Brummitt has filed a motion and affidavit for leave to file an untimely appeal from the judgment entered in this case on May 13, 2008, denying his § 2255 motion, together with a notice of appeal in the event his motion is granted.

A district court may extend the time for filing a notice of appeal upon motion filed no later than 30 days after the expiration of the time prescribed by Fed. R. App. P. 4 and upon the movant's showing of excusable neglect or good cause. Defendant filed his motion on August 13, 2008, which is within the 30-day period following expiration of the 60-day period he had in which to file a notice of appeal. He explains that his failure to file a timely notice of appeal was the result of his inability to obtain his legal papers from prison officials

and his preference to obtain help from a “law clerk ” with whom he was unable to communicate regularly. Although the excuses are not strong ones, I conclude that they are sufficient to find good cause for defendant’s missing the 60-day deadline for filing his notice of appeal and accept his notice of appeal as timely filed. Therefore, I will grant his request for an extension of time to file the notice of appeal.

Defendant’s notice of appeal was not accompanied by the \$455 fee for filing an appeal. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Therefore, I construe defendant’s notice as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915. According to 28 U.S.C. § 1915(a), a defendant who is found eligible for court-appointed counsel in the district court proceedings may proceed on appeal in forma pauperis without further authorization “unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed.” Defendant had appointed counsel during the criminal proceedings against him and I do not intend to certify that the appeal is not taken in good faith. Defendant’s challenge to his sentence is not wholly frivolous. A reasonable person could suppose that it has some merit. Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000).

However, in order for defendant to be able to take an appeal, he needs a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Recently, before he filed his notice of appeal, defendant asked this court to issue a certificate of appealability (dkt.

8). I denied that request on July 16, 2008, and defendant suggests no reason why that decision should not stand. Accordingly, to the extent that defendant's submissions may be understood to include a renewed request for a certificate of appealability, the request will be denied for the reasons expressed in the July 16, 2008 order.

ORDER

IT IS ORDERED that defendant Mark Brummitt's request for leave to file an untimely notice of appeal and his request for leave to proceed in forma pauperis on appeal are GRANTED; however, his renewed request for a certificate of appealability is DENIED.

Entered this 28th day of August, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge